



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Ragouba

Respondents: Washwood Healthcare Ltd t/a Wellbeing Pharmacy

Heard at: Birmingham

On: 10 September 2019

Before: Employment Judge Wynn-Evans

Representation
Claimant: In person
Respondent: Ms G Nicholls, counsel

JUDGMENT

Judgment having been sent to the parties on 11 September 2019 and written reasons having been requested by the Claimant, the following reasons are provided derived from the reasons given orally at the hearing.

REASONS

Introduction

1. The reasons for my judgment that the Claimant did not have a disability (within the meaning of section 6 and Schedule 1 of the Equality Act 2010) at the material time and that her complaint of unlawful disability discrimination contrary to the Equality Act 2010 was therefore dismissed are as follows.

2. This preliminary hearing was listed by Employment Judge Richardson at a preliminary hearing on 28 May 2019 to determine the following issues:-

- was the claimant disabled with reference to section 6 Equality Act 2010 at the date of dismissal/appeal hearing in January 2018.
- are all or any of the claimant's complaints of sex discrimination and, subject to (i) above, disability discrimination, out of time?

3. After discussion of the role of the interpreter which the claimant had requested, the nature of the strike out application that the respondent wished to make at this hearing, and given the time constraints arising from those discussions as well as the fact that a hearing bundle had regrettably not been produced and needed to be compiled before the hearing could proceed, it was concluded that the tribunal should proceed initially to address the disability issue with the other issues to be addressed subsequently.

4. I had before me a skeleton argument and associated documents from the respondent which was referred to as Bundle A and a bundle, which was referred to as Bundle B, compiled at my direction in an adjournment comprising the claimant's impact statements and associated medical evidence. I heard evidence from the claimant. Even taking into account that she was a lay person and that English is not her first language, although she was of course assisted by the interpreter, I found the claimant's evidence to be unclear and confusing in relation to the detail and timing of her medical situation even on supplementary questioning from myself seeking to clarify her position on key points, and accordingly attributed significant weight to the contemporaneous documentation from the various relevant medical professionals.

Relevant Law

5. Section 6 of the Equality Act 2010 (EA 2010) sets out the meaning of disability for these purposes and provides as follows:-

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

6. Schedule 1 to the EA 2010 sets out various supplementary provisions of which the following are relevant in this case:-

Long-term effects

2 (1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

7. In addition, the Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011) ("the Guidance") was issued in 2011 to assist Tribunals when determining whether a person meets that definition.

8. To summarise the key elements of the legislation when determining whether a person is disabled for these purposes:-

- Section 6 of EA 2010 provides that a person has a disability if he has a physical or mental impairment and it has a substantial and long-term adverse effect on his ability to carry out normal day to day activities.
- Substantial is defined as more than minor or trivial.
- Normal day to day activities are not defined but the Guidance suggests that they are things people do on a regular or daily basis. They can also include general work-related activities and study and education-related activities.
- Schedule 1 to EA 2010 provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to so last or is likely to last for the rest of the life of the person affected. Paragraph 2(2) of that Schedule says that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out such activities it is to be treated as continuing to have that effect if that effect is likely to recur.

9. The question of disability has been distilled into four questions that a tribunal should consider:

- Did the claimant have a mental or physical impairment?

- Did the impairment affect his ability to carry out normal day to day activities?
- Was the effect substantial?
- Was the effect long term?

10. Making that assessment is a question of fact and degree based upon the evidence paying particular attention to what the claimant cannot do rather than what she can and how the claimant carries out an activity compared to how she would do it if she were not impaired. On the other hand, the fact that a claimant can only carry out activities with difficulty does not establish a disability.

11. *J v DLA Piper UK LLP* UKEAT/02638/09 indicated that it is good practice for a tribunal to state conclusions separately on questions of impairment and adverse effect, and it will usually make sense to start by recording the claimant's ability to carry out normal day to day activities, then consider impairment. That decision also discusses, as general points, making a distinction between depression as an illness, and depressive symptoms which are a reaction to adverse life events. When considering both the adverse effect issue and the impairment issue, tribunals may have to look behind the labels.

Normal day to day activities

12. EA 2010 does not define what is to be regarded as a 'normal day-to-day activity' but the Guidance notes that it is not possible to provide an exhaustive list of day-to-day activities but that, in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Long term

13. Where it is necessary to project forward to determine whether an impairment is long-term (see paragraph 2(1)(b) of Schedule 1), in *SCA Packaging Limited v Boyle* [2009] ICR 1056 HL, Baroness Hale, with whom the other Justices of the Supreme Court agreed, clarified that in considering whether something was *likely*, it must be asked whether it *could well happen*. The Guidance accordingly now states (see paragraph C3) that "likely" should be interpreted as meaning that "it could well happen", not that it is more probable than not that it will happen.

Substantial adverse effect

14. In determining whether an impairment has a substantial adverse effect on a person's ability to carry out day to day activities, measures to treat or correct the impairment are not taken into account if - but for those measures - the impairment would have that effect.

15. The Guidance clarifies that the requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.

Findings of fact

16. I now set out my findings of fact based on my assessment of the evidence before me.

17. In her statement of 15 October 2018 the claimant confirmed that she had not suffered from any mental health problems before becoming employed by the respondent and that she was diagnosed by her GP with depression and anxiety on 27 July 2017.

18. In assessing that statement and the claimant's evidence more generally it is important to identify about which specific periods she is talking when describing her medical position. In her statement of 15 October 2018 she stated – importantly in the present tense - that she had difficulty leaving her house, was unable to trust people, was unable to apply for jobs and found it difficult to cope in social situations. She also confirmed that she was prescribed Mirtazapine and Citalopram for her depression, and that her depression caused her to suffer from low energy and mood swings. Subsequent events are not irrelevant to the determination of the issue of whether the claimant was a disabled person at the material time – her dismissal in January 2018 – as subsequent events can be taken into account in the tribunal's assessment of that issue. Nonetheless, it is important to recognize that in my view this aspect of the claimant's statement relates to October 2018 as opposed to the period leading up to her dismissal in January 2018.

19. The claimant's second statement of 15 November 2018 is consistent with that analysis as in essence that statement explained her failure to attend a preliminary hearing on 13 November 2018 on the basis of her feeling anxious and stressed due to her diagnosed anxiety with depression. Likewise, the "to whom it may concern" letter issued by Cofton Medical Centre on 16 November 2018 states that the claimant has ongoing serious mental health problems which are quite disabling for her in that she is unable to leave the house due to the seriousness of her anxiety and references her Citalopram prescription. As the claimant's statements and letter from Cofton Medical Centre do not provide any further specific detail as to the preceding period or indeed the period from her diagnosis in July 2017 until October 2018 I base my conclusions in relation to preceding period on the contemporaneous documents and the evidence given by the claimant orally under cross examination by Ms Nicholls and in response to questions from me.

20. It is clear that as at 27 July 2017 the claimant did have mental health difficulties. Reference is made in the letter from Birmingham Healthy Minds of that date skills and coping strategies to help the claimant manage her depression and anxiety symptoms. Sources of counselling and crisis support were referenced also in that letter. However, this letter refers to depression and anxiety symptoms and does not in my assessment

amount to a formal diagnosis of depression although I am conscious as noted above that the tribunal may need to look beyond the labels in assessing whether the statutory requirements for disabled status are satisfied. The claimant was subsequently invited by letter dated 17 August 2017 to four sessions concerning stress management. In the bundle was a letter of 5 September 2017 recording amongst other things that the claimant had not attended the first of those sessions.

21. On 26 September 2017 Birmingham Healthy Minds wrote to the Claimant's GP surgery. Amongst other things that letter referenced the claimant having presented with symptoms of depression on 27 July 2017, having attended two of the four CBT based sessions she had been referred to, that it has been suggested to her that counselling could prove beneficial to her and, importantly, that she was now discharged from their care. This letter was signed by an Assistant Clinical Psychologist, Majid Cheway. The claimant sought to argue that she had been discharged from their care as they could do no more for her and she needed more serious assistance. Particularly in the absence of any reference to the need for a greater level of medical intervention in that letter I do not accept that explanation.

22. On 5 December 2017, Cofton Medical Centre wrote to the respondent confirming various specific points concerning the claimant. These included the fact that she continued to suffer with feelings of stress and anxiety, her feeling negatively about the prospect of returning to her old job even though the manager she had had difficulties with having left the organization, and the fact that the claimant's prescription of Citalopram in August 2017 had not been continued. (The letter stated that it was not clear whether the prescription was wanted or taken and the claimant indicated that she had decided not to take that medication).

23. On 11 December 2017 Cofton Medical Centre confirmed in a "to whom it may concern" letter that the doctor would be grateful if the claimant could receive further counselling as she had been finding it useful in terms of helping her manage her anxiety and stress.

24. The claimant attended weekly counselling sessions with the St Martin's Centre for Health and Wellbeing which confirmed, in a letter dated 22 January 2018, that commencing from 28 September 2017 the claimant had at the time of writing attended 7 counseling sessions.

25. In terms of medication, according to the Claimant's medical records before me in the bundle, she was prescribed Citalopram in August 2017 but not subsequently until September 2018.

26. The claimant's medical records noted that she had the problem of "anxiety with depression" on 8 December 2017 which entry had a "date ended" of 7 June 2018. The claimant was unable to explain why those dates had been recorded in her records.

27. It was not disputed that, in the period of her absence from 1 August 2017 onwards, the reasons for her inability to attend work had been identified in the claimant's fitness to work certificates as variously work related stressors and anxiety, stress related problems at work, stress at work and work related stress.

28. It was not disputed by the claimant that in her appeal letter on 10 January 2018 the claimant stated that she was in a “fair health condition now” and believed she would be able to return to work on a phased basis following a holiday. Likewise, in the certificate before me dated 17 January 2018 – i.e. just before the claimant’s dismissal - referenced “work related stress” as the relevant condition. Moreover, that certificate stated that the claimant wanted to return to work in February following a period of annual leave on a phased basis.

29. It was also not disputed by the claimant that, as recorded in the appeal outcome letter of 25 January 2018, she had confirmed that she was getting much better, was shopping, seeing people, managing her stress and getting back to normal.

30. In the course of her evidence the claimant also confirmed that she worked as a volunteer for a pharmacy on a part-time basis from time to time for a period of six months following her departure from the employment of the respondent.

Analysis

31. Taking the constituent elements of the definition of disability set out in EA Act 2010 in turn my conclusions are as follows, reminding myself that I am applying the test on the basis of the position at the material time being the claimant’s dismissal in January 2018.

Did the claimant have a mental or physical impairment?

32. In my judgment, the claimant has not established that she suffered from a mental impairment for the purposes of section 6 of EA 2010 at the material time. The consistent picture from the medical evidence before me in respect of the period from 27 July 2017 to the date of dismissal in January 2018 is not of an impairment of depression but of depressive symptoms as a reaction to adverse life events. The claimant was never actually diagnosed with depression and, whilst one must of course look behind the labels, the consistent assessment of the contemporaneous evidence indicates that the claimant was suffering from work related stress on a basis which does not in my judgment amount to an impairment as required for these purposes. That the claimant’s condition appears to have been very much more serious in November 2018 does not in my view undermine that conclusion.

Did the impairment affect the claimant’s ability to carry out normal day to day activities?

33. As I have found that there was no impairment this issue is otiose but I would have found that the impairment did affect the claimant’s ability to carry out normal day to day activities not least as she was unable to attend work.

Was the effect substantial?

34. As I have found that there was no impairment this issue is otiose but I would have found that the effect of the impairment was substantial not least as she was unable to attend work.

Was the effect long term?

35. Even if I were wrong in finding that the claimant did not suffer at the material time from an impairment for the purposes of EA 2010, I am not satisfied that, assessed at the material time of January 2018, it was long term in the sense of being likely to last at least 12 months. The claimant's issues had arisen in late July 2017 and, whilst she had undergone medical supervision, she had been discharged from the care of Healthy Minds by late September 2017. It was confirmed in January 2018 that the claimant was fit to return to work in February 2018 on a phased return to work basis. The claimant had not been prescribed Citalopram after August 2017 and she was able shortly after dismissal to take up 6 months of voluntary work at a pharmacy. She had confirmed to the respondent in the appeal process that she was getting much better and getting back to normal. On the basis of these indications of an ongoing recovery in the period from August 2017 to dismissal in January 2018 and indeed beyond, and in the absence of any more formal medical diagnosis and prognosis I am not satisfied that the claimant's condition, such as it was, was likely to last for 12 months in the sense that I must assess that likelihood – could it well happen.

Judgment

36. On the basis of the above analysis I concluded that the claimant was not a disabled person at the material time for the purposes of section 6 of the Equality Act 2010.

Employment Judge Wynn-Evans

6 January 2020

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